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Supreme Court of the United States

October Term, 1951.

No. 309

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - Petitioner,

versus

THE B. F. GOODRICH COMPANY, - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

AND

BRIEF IN SUPPORT OF PETITION.

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Supreme Court of the United States

October Term, 1951.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner,*

v.

THE B. F. GOODRICH COMPANY, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY.

Your petitioner, Louisville and Jefferson County Metropolitan Sewer District, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky (highest court of the State) entered in the above cause June 12, 1951 (R. 83).

OPINIONS OF STATE COURT.

The judgment or opinion of the Court of Appeals of Kentucky, review of which is sought, has not been officially reported, but is reported in 240 S. W. 2d 621. It became final on July 17, 1951. A certified copy of

the opinion will be found at pages 83 to 84 of the Record.

That judgment affirms a decision of the Jefferson Circuit Court granting respondent a perpetual injunction against any sewer charges. This injunction had been denied on the first trial (R. 57-58), but this respondent had appealed and the action was reversed (R. 59).

On the first appeal, the Kentucky Court of Appeals had to, and did, consider and determine two conflicting claims involving the Constitution of the United States. The previous decision is reported as Bond Brothers, etc., v. Louisville and Jefferson County Metropolitan Sewer District, *et al.*, etc., and *The B. F. Goodrich Company, Appellants,* v. *Louisville and Jefferson County Metropolitan Sewer District, et al., Appellees, etc.,* 307 Ky. 689, 211 S. W. 2d 867. This opinion is on pages 61 to 73 of the Record.

Pursuant to a 1946 Act of the Kentucky Legislature (now K. R. S. Chap. 76) the Metropolitan District established a schedule of sewer service charges to be collected from owners of all property served. (Exhibits "C" and "E," R. 32-38, 41-44.) Respondent immediately brought this action to enjoin collection of any charges from it. It claims that a judgment-contract gives it free sewer service (R. 3-4).

That contract was made in 1929 in the settlement of a condemnation action (Exh. "A," R. 26-27). At that time no statute authorized sewer service charges in Louisville. The contract did not mention such charges. The Chancellor held that the contract did not

provide for sewer service free (R. 58). On respondent's appeal, however, the Kentucky Court of Appeals held that the contract did entitle respondent to free use of the sewer (R. 66).

This interpretation of that contract made it necessary for that Court to consider legality of further performance of the contract. This required determination of two conflicting claims based on rights and duties under the Federal Constitution. Respondent claimed that the contract gave it a property right protected by the Federal Constitution. The Metropolitan District claimed that the statute requires that the charges be uniform within the same classification. This meant that even if the 1929 contract provided for free sewer service, the District could no longer legally furnish same. The schedule of charges was established to enable the District to perform its work "in the interest of public health and . . . providing adequate sewer and drainage facilities . . ." The District's position was then that after establishment of these rates, free sewer service would violate the Fourteenth Amendment.

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79, 107, 46 L. Ed. 92, 108, 22 S. Ct. 30.

The first opinion recognized both constitutional rights, then held the property right superior, closing with these words (R. 72-73):

> ". . . we hold that the appellants' contract cannot be abrogated or their vested rights destroyed by imposing sewer service charges promul-

gated by the Metropolitan District without due compensation being made.

"The judgments are, therefore, reversed for consistent proceedings."

Despite efforts by petitioner to have proceedings consistent with the previous opinion, including determination of any just compensation, the Chancellor refused to file the amended answer, then granted respondent a perpetual injunction against collection of any sewer charges from it. The second judgment of the Court of Appeals affirmed this injunction without further discussion of the constitutional issues.

This petition for certiorari must, therefore, discuss both those decisions of the Kentucky Court of Appeals and their ultimate effect.

JURISDICTIONAL STATEMENT.

Jurisdiction of this Court is founded on Subsection (3), Section 1257, Title 28, United States Code. The validity of a State statute was drawn in question on the ground of its being repugnant to the Federal Constitution. The decision was in favor of the constitutional right claimed, and against the validity of the statute.

This decision then caused a more serious violation of the Federal Constitution, the prevention of equal protection to all sewer-users. Hence this right of sewer-users (duty of the Metropolitan District) makes an additional jurisdictional point for granting a writ of certiorari.

Sewer service charges, new to Louisville, were authorized by a 1946 legislative Act (K. R. S. 76.090). This statute requires any service charges "to be collected from all real property served" and that such charges "shall be uniform for all property falling within the same classification."

Respondent claims in its petition that exacting any charges from it "for the use of the sewer facilities is an impairment of the contract obligation" (R. 24). The petition claims this to be in violation of Section 10 of Article I of the Constitution of the United States, and takes property in violation of the Fifth and Fourteenth Amendments to said Constitution. These allegations were specifically denied in the Answer (R. 48-49).

The Chancellor interpreted the contract as meaning connections into, not use of, the sewer to be constructed. This interpretation made it unnecessary for him to consider the Constitutional questions. The first Court of Appeals decision changed this interpretation (R. 62-66). With the 1929 contract interpreted to mean free use of the public facilities, it then became necessary to consider the constitutional questions.

That opinion on the first appeal recognized the presence of the two constitutional questions—exercise of police power versus protection of contract rights. That opinion says as to police power (R. 66):

> "To accomplish that objective the full force of the power may be applied, and that may require that property rights be subordinated even though they are otherwise within the protection of the Constitution."

Despite this correct statement of constitutional principles, the Court of Appeals held that it was dealing with a question of supremacy and that the police power could not unreasonably invade private rights and violate rights guaranteed under the Federal Constitution (R 67).

The opinion closes with the holding that sewer service charges can not be imposed "without due compensation being made." The effect of the two decisions is that the property right is supreme over the exercise of the police power and to deny equal protection to all other sewer users.

Federal questions decided on that first appeal may, of course, be considered on this petition.

Louisiana Nav. Co. v. *Oyster Commission of Louisiana,* 226 U. S. 99, 57 L. Ed. 138, 33 S. Ct. 78;

Southern Railway Co. v. *Kentucky,* 274 U. S. 76, 71 L. Ed. 934, 47 S. Ct. 542;

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Republic Natural Gas Co. v. *Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972;

Urie v. *Thompson, Trustee,* 337 U. S. 163, 93 L. Ed. 1282, 63 S. Ct. 1018, 11 A. L. R. 2d 252.

This judgment is final now. The injunction granted is perpetual. This was not true of the first decision. The case was returned for consistent proceedings.

At that time no injunction on this ground had ever been granted; none was directed. Consistent proceed-

ings might have been taken at the instance of one party or the other:

(a) Injunction against sewer charges *until due compensation* made;

(b) Filing of pleadings to determine due compensation (as in L. & N. R. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (n. s.) 848, cited in Ortega Co. v. Triay, Receiver, 260 U. S. 103, 67 L. Ed. 153, 43 S. Ct. 44).

(c) Filing of pleadings to determine just what sewer use was meant by sewage and drainage "from the first party's existing property";

(d) Granting injunction, in accordance with contract, for only the 1929 "existing property";

(e) Granting perpetual injunction from any sewer charges against Goodrich's described property.

It is evident that with the case in the situation on the first appeal, the constitutional questions might have been eliminated. And new ones might have arisen. The case had such possibilities then that it was not ready for application to this Court. This Court has always insisted that there be actual finality except where intermediate rulings may carry serious public consequences.

Catlin v. *United States,* 324 U. S. 229, 89 L. Ed. 911, 65 S. Ct. 631;

Radio Station W. O. W., Inc., v. *Johnson,* 326 U. S. 120, 89 L. Ed. 2092, 65 S. Ct. 1475;

Republic Natural Gas Co. v. *Oklahoma,* 334 U. S. 62, 92 L. Ed. 1212, 68 S. Ct. 972.

The highest court in Kentucky has now specifically decided two constitutional questions, denying equal protection of the law. This is contrary to the decisions of this Court, and this Court has the jurisdiction to consider and correct those errors. No other Court has now.

SUMMARY STATEMENT OF MATTER INVOLVED.

Prior to 1947 sewers in Louisville had been constructed by the City or by a former agency, the Commissioners of Sewerage. Construction had been financed principally from proceeds of bond issues, paid from taxes. Sewers had been maintained by the City through property taxes.

In 1946, the Kentucky Legislature authorized creation of metropolitan sewer districts "in the interest of public health and for the purpose of providing adequate sewer and drainage facilities." Such districts are empowered to supervise, operate and maintain the sewer system in cities of the first class and environs (K. R. S. 76.010).

Petitioner was organized pursuant to said Act. The Act does not give such districts any authority to levy taxes or require any appropriations from other public agencies. The Act authorizes a district to collect service charges, which must finance construction and maintenance of sewers, drains, treatment plants and other facilities (K. R. S. 76.090).

The Louisville and Jefferson County Metropolitan Sewer District by resolution provided for such charges

to begin in August, 1947 (Exhibits "C" and "E," R. 32-38, 41-44). Respondent is a sewer user. Its property is near one of the District's large sewers, the Southwestern Outfall. The right of way for this sewer was procured from respondent's predecessor through a condemnation suit. This suit was ended with a settlement or judgment contract (Exhibit "A," R. 26-27).

The deed for the right of way followed the terms of this contract, and one paragraph provides:

> "Second party (Sewage Commissioners) stipulates and agrees to construct suitable openings or connections into its main sewer on either side thereof, for first party's use in connecting its sewage and storm water or natural drainage from the first party's existing property." (Petition, R. 3-4.)

Respondent claims this contract runs with the land and gives to it a permanent right to free use of the sewer. The Metropolitan District claims that even if the contract be interpreted as giving the right to free use of the sewer, the 1946 Sewer District Act prevents further compliance. Section 76.090 provides in part:

> "(1) Upon taking and assuming control of such existing sewer and drainage system the district is authorized to establish a schedule of rates, rentals and charges, to be collected from all the real property served by the facilities of such district . . ."
>
> "(2) . . . Such schedule shall be uniform for all property falling within the same classification . . ."

In seeking to comply with that statute the Metropolitan District has sought to collect from all sewer users, including respondent, the regularly established charges. Respondent denies all liability, and at the same time claims that it should be classified with sewer-users located in the City. Its petition states in part:

> "It was and is the duty of the District to establish reasonable rates applicable uniformly to property falling within the same general classification, and the real estate owned by Goodrich falls within the same general classification as real estate situated within the limits of the City on which manufacturing plants are operated."

The petition then claims that applying rates higher than the City rates "denies to Goodrich the equal protection of law guaranteed to it by the provisions of the Fourteenth Amendment to the Constitution of the United States."

The question of classification was decided by the Chancellor in respondent's favor (R. 57). The Court of Appeals, however, upheld the classification in another case and only referred to this holding in the first opinion in this (R. 61). Since then the District has revised all rates to the City schedule.

Respondent's suit also seeks to enjoin collection from it of any sewer charges. The Chancellor denied this, on the idea that the contract provided for the right to connections, not to free use.

On respondent's appeal the Court of Appeals held that the contract does provide for free use of the sewer.

That opinion holds that this vested right can not be destroyed by imposing sewer service charged, "without due compensation being made" (R. 72-73). The action was reversed for consistent proceedings.

This direction was anomalous and confusing. The Metropolitan district had not brought any action to abrogate a contract. It performs public utility service, so raised the question as to legality of further performance of this contract. The holding of the Court of Appeals indicated that sewer charges were proper—upon making due compensation. The Metropolitan District tendered an Amended Answer attempting to determine "due compensation" (R. 76-81).

No question is raised here as to the position of respondent on the filing of this pleading. But the District is, by the injunction, required to violate the statute as to collecting service charges from all real estate and uniformity of rates. This is true, whether or not the respondent is entitled to, or has or has not received "due compensation." Respondent may look to its own rights for compensation, but the District should not be compelled to violate the Fourteenth Amendment to the Federal Constitution.

QUESTIONS PRESENTED.

The effect of the Court of Appeals' decision on June 12, 1951, is to require a publicly owned utility to provide free service to one of the property-owners making the greatest use (816,500,000 gallons per year) of this sewer system (R. 22). The rulings of the Ken-

tucky Court of Appeals in this case raise two important questions of constitutional law, to-wit:

1. Does providing free sewer service in violation of a State statute constitute a violation of the Fourteenth Amendment to the United States Constitution as denying equal protection of the law to all users?

2. Can a contract for free use of the sewer, claimed to be protected by Section 10 of Article I of the United States Constitution and by the Fifth and Fourteenth Amendments thereto, be enforced as a property right, when performance of this contract will violate the equal protection clause of the Fourteenth Amendment?

REASONS FOR GRANTING A WRIT.

The entire work of constructing and maintaining sewers and drains in Louisville, Kentucky, and some of the adjoining territory is in the hands of the Metropolitan Sewer District. This District does not have the authority to levy taxes and receives no appropriation from any other unit. Its sole source of revenue for both construction and operating expense is a service charge.

Prior to the 1946 Act under which this Metropolitan District was organized there was no legislative authorization for service charges. The validity of these charges has since been upheld. *Veail* v. *Louisville and Jefferson County Metropolitan Sewer District,* 303 Ky. 248, 197 S. W. 2d 413.

This right to make service charges against sewer users outside the City of Louisville was also specifically

upheld in *L. & J. Metropolitan Sewer District* v. *St. Matthews Sanitary Association,* 307 Ky. 207, 208 S. W. 2d 490. The operation of the sewer facilities by this District must be on the same basis to all users in the same classification. Respondent's petition asserts this very principle. In *L. & J. Metropolitan Sewer District* v. *Joseph E. Seagram & Sons,* 307 Ky. 413, 211 S. W. 2d 122, the Kentucky Court of Appeals specifically holds as to the District's rates that:

> "Discrimination in rates or services is not permitted by municipalities any more than private utilities."

Those decisions recognize operation of this District to be on a basis similar to other public utilities. So does the statute.

The imposition of sewer service charges is by a general regulation. The Metropolitan District has taken no specific action to abrogate any contract with respondent. The illegality of the free service results from that regulation. No supervising Commission enforces application of rates by the Metropolitan District. The District itself, as a public agency, must comply with the law. Hence it contends that further free service by it is illegal.

This Metropolitan Sewer District has attempted to provide sewer service to similar users on a uniform basis of charges. But the injunction now granted to respondent prevents this.

The opinion on the first appeal says in part (R. 66):

> "As we have observed today in the St. Matthews Sanitary Association opinion delivered to-

day, the construction of sewers and drains is a certain object of the police power."

The opinion then refers to the right to collect charges under this statute, and says further as to exercise of the police power (R. 66-67):

> ". . . We are here dealing with supremacy in such a conflict. The touch stone is necessity and reasonable relationship. It is fundamental that such an extraordinary power is not without limitation, for it may not operate unreasonably beyond the occasion or necessity of the case. It may not unreasonably invade private rights and thus violate those rights guaranteed under either the Federal or the State Constitution. 11 Am. Jur., Constitutional Law, Sec. 259."

The question of supremacy was then completely determined upon return of the case to the Circuit Court and the granting of the perpetual injunction. This supremacy of private contract rights over the State's exercise of the police power directly conflicts with the constitutional principle of equal protection to all sewer users.

The effect is to recognize the rights of an individual user of public facilities over the principle of equal rights required under the police power and the Fourteenth Amendment. This decision is not in accord with applicable decisions of this Court; it conflicts with them.

One case recognized by the Kentucky Court of Appeals opinion as controlling in regard to rates is *L. & N.*

R. R. Co. v. *Mottley,* 219 U. S. 467, 66 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A. (n. s.) 671. That opinion discussing a contract for free transportation says as to authorities (219 U. S. 485):

> "They support the view that, as the contract in question would have been illegal if made after the passage of the commerce act, it cannot now be enforced against the railroad company, even though valid when made."

The principles of this case have been recognized and enforced ever since. Any contract right which respondent may have had must be compensated some other way, as in *L. & N.* v. *Crowe,* 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (n. s.) 848. The contract is no longer valid. Hence the second question must be answered in the negative.

There is no governmental agency, such as a public service commission, to enforce laws against discrimination as to sewer rates. The Metropolitan District, as a municipal corporation performing utility services, however, must comply with such laws. In this case, after determination by the Kentucky Court of Appeals, that it had a contract for furnishing free sewer service, the District had a duty of resisting further performance if not legal. That is what happened in this case.

The Court of Appeals' judgment that sewer service must be provided free under that contract has caused continuous demands since that similar contracts be now made, as new easements are required. This Court can prevent the Metropolitan District from being com-

pelled to violate this statute. This Court alone now can prevent enforcement of this discrimination against other sewer users.

PRAYER.

WHEREFORE, petitioner prays that a writ of certiorari be issued by this Court directed to the Court of Appeals of Kentucky, to the end that the decision and judgment of that Court in this cause may be reviewed by this Court and the judgment of that Court be reversed.

BLAKEY HELM,
Attorney for Petitioner.

Supreme Court of the United States

October Term, 1951.

LOUISVILLE AND JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, - *Petitioner,*

v.

THE B. F. GOODRICH COMPANY, - - *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

STATEMENT OF CASE.

Respondent owns a 54-acre tract of land in Jefferson County, Kentucky, southwest of Louisville near a stream known as Lower Paddy's Run. This land was in 1929 a part of a tract (170 acres) owned by Producers Wood Preserving Company. The Commissioners of Sewerage sought to condemn an easement across Producers' property for an open outfall sewer.

After reversal on the question of damage, the Commissioners changed the project to a closed concrete sewer. Then an agreed judgment was entered in the condemnation action and a deed to the easement was given. The Commissioners constructed a large concrete sewer through the easement.

The said sewer is, through legislative action, now a part of the system controlled and operated by the Louisville and Jefferson County Metropolitan Sewer District. Respondent now owns part of the land through which the sewer was built.

On the 54-acre tract respondent operates two large manufacturing plants, not there in 1929. The sewage from these plants passes into the large sewer (R. 2-3, 26, 62-63).

The judgment contract gave to the Commissioners a perpetual easement to lay covered sewers, but obligated them to fill the ditch even with or above the natural surface of the creek bed within 3 years.

The grantor was given the right at any time to fill the creek valley up to the level of the ground on each side. The contract also provided for the Commissioners constructing suitable openings or connections into the main sewer, "for defendant's use in connecting its sewerage and storm water or natural drainage from the defendant's existing property" (R. 26-27).

The connections were made. The sewerage and drainage were carried through this sewer free until August, 1947, when charges for sanitary sewerage only became applicable in Louisville (R. 20).

This litigation resulted. The Court of Appeals in the first opinion said the provision as to connections to the sewer "is not clear *prima facie.*" But it then held that this provision intended free use (R. 66). In another case decided the same day that Court held that a contract to allow the St. Matthews Sanitary

Association to connect with the Louisville sewer system meant only the same right which Louisville inhabitants had—connection with a service charge. *Louisville and Jefferson County Metropolitan Sewer Dist., et al.,* v. *St. Matthews Sanitary Assn.,* 307 Ky. 348, 208 S. W. 2d 490.

The Court of Appeals had indicated that due compensation must be paid before charges could be made. The Metropolitan District attempted to have all rights determined in this case. The Chancellor refused to permit this. He granted a complete perpetual injunction. Regardless of compensation, the injunction compels violation of the statute and the Fourteenth Amendment.

ARGUMENT.

One important reason for granting certiorari, specified in Rule 38 of this Court, is that the State court has decided a federal question probably not in accord with applicable decisions of this Court. This ground is of particular importance in Kentucky. The Courts of that State have shown such a great respect for contract rights, that they have often failed to fully appreciate legal principles of more general importance.

This attitude has caused Kentucky courts to give contract rights superiority over exercise of police power. In this case again the police power needs a friend and protector, to support the principle of equal rights among similar sewer users.

A. Police Power Has Had to Struggle.

Individual freedom has been a fundamental principle in the life and government of Kentuckians. Devotion to these rights has brought many decisions which have come to this Court.

(1) Lotteries preceded horse-racing in the vital life of Kentuckians. Schools, libraries, public buildings, even drains and sewers were built from lottery proceeds. Lotteries were authorized by statute. Frankfort sold one privilege with 30900 classes. A test case in the Kentucky Court of Appeals held that a lottery franchise was a property right. The 1891 Constitution provided that all lottery privileges are revoked. One Douglas still held the Frankfort franchise, which he operated in Louisville. The Commonwealth brought suit to stop this. Douglas pleaded *res adjudicata* and that the lottery privilege was a contract right under the Federal Constitution.

The Louisville *Law and Equity Court upheld* the *defenses.* The Kentucky Court of Appeals held that this contract right was subject to the police power. *Commonwealth* v. *Douglas,* 100 Ky. 116, 24 S. W. 233. Douglas was persistent, and this Court held that the franchise was not such a contract as the Constitution would protect against State exercise of the police power. *Douglas* v. *Commonwealth of Kentucky,* 168 U. S. 488, 42 L. Ed. 553.

(2) In September, 1871, Colonel E. L. Mottley and his wife were injured in a train collision. They settled their claims for an agreement for life-time passes.

The Railroad Company performed the contract until the June 29, 1906, amendment to the Interstate Commerce Act. When the Railroad Company hesitated to continue the passes, the Mottleys brought suit in the United States Circuit Court, claiming contract rights protected by the Federal Constitution. The Circuit Court *sustained* the Mottleys. *Mottley* v. *L. & N. R. R. Co.,* 150 Fed. 406. This Court directed dismissal for want of jurisdiction. *L. & N. R. R. Co.* v. *Mottley,* 211 U. S. 149, 53 L. Ed. 126, 29 S. Ct.

The Mottleys then brought suit in the Warren Circuit Court. *That Court sustained them.* On appeal, the *Kentucky Court of Appeals sustained them. L. & N. R. R. Co.* v. *Mottley,* 133 Ky. 652, 118 S. W. 982. Then this Court held that the contract could no longer be legally performed. *L. & N. R. R. Co.* v. *Mottley,* 219 U. S. 467, 55 L. Ed. 297, 31 S. Ct. 265, 34 L. R. A. (N. S.) 671. (Then Colonel Mottley and the Railroad president settled amicably.)

(3) In 1894 James A. Murray conveyed a right of way to the trolley company which later operated between Frankfort and Lexington. He received as compensation life time passes for himself and family. In 1916 Kentucky passed an anti-pass law. Murray brought suit for a mandatory injunction. The *Franklin Circuit Court granted this.* The Kentucky Court of Appeals, however, held that this was a valid exercise of the police power and did not violate the Federal Constitution. *Ky. Traction & Terminal Co.* v. *Murray,* 176 Ky. 593, 195 S. W. 1119.

That case was brought to this Court, but dismissed. *Murray* v. *Ky. Traction & Terminal Co.*, 249 U. S. 628, 63 L. Ed. 806, 39 S. Ct. 388.

(4) In 1929 the Commissioners of Sewerage of Louisville purchased an easement through land now owned by respondent. Respondent claims that part of the consideration was free use of the sewer. In 1946 a statute was passed authorizing sewer service charges. Schedules of charges were established. Respondent claimed that his contract prevents any charges being made against him. The Circuit Court interpreted the contract as not giving free sewer use.

The Kentucky Court of Appeals met the question squarely, held that the contract right had superiority over exercise of the police power. So this case is now before this Court.

This Court has upheld the rights of a State Commission or City Board to regulate rates or practices despite interference with an existing contract:

As to transportation rates—

Producers Transportation Co. v. *Railroad Commission of California*, 251 U. S. 228, 64 L. Ed. 239, 49 S. Ct. 131;

Ortega Company v. *Triay, Receiver*, 260 U. S. 103, 67 L. Ed. 153, 43 S. Ct. 44.

As to electric rates—

Union Dry Goods Co. v. *Georgia Public Service Corporation*, 248 U. S. 372, 63 L. Ed. 309, 39 S. Ct. 117.

As to water rates—

Knoxville Water Co. v. *Knoxville,* 189 U. S. 434, 47 L. Ed. 887, 23 S. Ct. 531.

Except for the decision on the first appeal of this case, the Kentucky Court of Appeals has consistently, since this Court's decision in L. & N. v. Mottley, *supra,* held that contracts as to public utility services must give way to exercise of the police power.

L. & N. R. R. Co. v. *Crowe,* 156 Ky. 27, 160 S. W. 759, 49 L. R. A. (N. S.) 848;

Ky. T. & T. Co. v. *Murray,* 176 Ky. 593, 195 S. W. 1119;

L. & J. Co. Met. Sewer District v. *St. Matthews Sanitary Association,* 307 Ky. 207, 208 S. W. 2d 490.

In all but one of these cases the trial court upheld the contract right. In that one case it was not necessary to pass on that issue. In the lottery and anti-pass cases, the Kentucky Court of Appeals upheld the exercise of police power. In the Mottley case and the instant case, the Kentucky Court of Appeals upheld the contract right as against the exercise of police power.

This Court has consistently upheld this question of principle as against a contract with a public utility. We look with confidence and hope to such result here.

B. State Court Decision Not in Accord.

This Metropolitan District was created in the interest of health and to provide more adequate sewers. Section 19 of the 1946 Sewer Act (now K. R. S. 76.210) reads in part, as follows:

> "It is hereby found and declared that the creation of the District and the carrying out of its corporate purpose is in all respects in the interest of the public health and is a public purpose; that the District is performing a governmental function in the exercise of its powers conferred upon it by this Chapter . . ."

This Court has specifically recognized the fact that establishment of sewers is an exercise of police power with which previous contract rights cannot interfere.

> *New Orleans Gas Lt. Co.* v. *Drainage Commission,* 197 U. S. 453, 49 L. Ed. 831, 25 S. Ct. 471;
> *C. & A. R. R. Co.* v. *Tranbarger,* 238 U. S. 67, 59 L. Ed. 1204, 35 S. Ct. 678.

This Court has also determined that establishment of sewer rates is a legislative function, not affected by previous assessments for construction.

> *Carson* v. *Sewer Commissioners of Brockton,* 182 U. S. 398, 45 L. Ed. 1151, 21 S. Ct. 860.

RESUME'.

The effect of the decisions of the Kentucky Court of Appeals in this case is to have a federal question decided contrary to the cases decided by this Court, contrary to the other decisions by the Court of Appeals of Kentucky, and contrary to decisions generally in regard to these federal questions.

In order that the Metropolitan Sewer District may, in accordance with the Kentucky statute, provide sewer services at the same rate to similar users, it is necessary for this Court to grant the petition for certiorari, and take consideration of this case.

Respectfully submitted,

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